

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

JOANNA DYKES; DAVID WALKER,
by and through his next friend, Michele
Beauregard; **HEATHER YOUNG,** by
and through her next friend Robert Stark;
**MICHELLE CONGDEN; AMANDA
PIVINSKI;** and **DISABILITY RIGHTS
FLORIDA, Inc., a Florida non-profit
corporation,**

Plaintiffs,

v.

CASE NO.:

ELIZABETH DUDEK in her official
capacity as Secretary of the Florida Agency
for Health Care Administration, and
BRIAN VAUGHAN in his official capacity
as (Interim) Director of the Florida Agency
for Persons with Disabilities, and
RICK SCOTT in his official capacity
as Governor of the State of Florida.

Defendants.

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**CLASS ACTION COMPLAINT
FOR
DECLARATORY AND INJUNCTIVE RELIEF**

1. This is a statewide class action brought on behalf of over 19,000 individuals with developmental disabilities, as defined by Section 393.063(9) of the Florida Statutes, who are eligible to receive services through Florida Medicaid in intermediate care facilities for

the developmentally disabled (ICF/DD)¹ and in the community under Florida's Home and Community Based Services Waivers for persons with developmental disabilities ("DD Waivers").

2. The plaintiffs are persons who are unable to fully care for themselves and, therefore, require various degrees of care, treatment, and/or habilitation. The plaintiffs seek appropriate day services, therapies, behavioral supports, residential placement, and other home and community based services to enable them to reside in the most integrated setting possible.
3. Some plaintiffs reside in private ICF/DDs or nursing homes where they have been confined to a category of waiting persons that will never move forward on the list.
4. Some plaintiffs reside in their families' homes and have been on the DD Waivers wait list for over five years. They will not be prioritized for the DD Waiver until their caretakers succumb to incapacitation or death.
5. Plaintiffs have been placed on waiting lists for enrollment on the DD Waivers where they languish for years without services thereby placing them at risk of institutionalization and regression of skills and therapies learned from educational programs.
6. The defendants have failed to provide the plaintiffs with appropriate community services through the DD Waivers in order to avoid institutionalization.²

¹ On February 3, 2011, Rule 59G-6.045 of the Florida Administrative Code - Payment Methodology for Services in Facilities Not Publicly Owned and Publicly Operated (Facilities Formerly Known as ICF/DD Facilities) - was filed. For simplicity, the term "ICF/DD" will be used herein.

² DD Waiver services that are available include the following: Adult Day Training, Adult Dental Services, Behavior Analysis Services, Behavior Assistant Services, Companion Services, Consumable Medical Supplies, Dietitian Services, Durable Medical Equipment and Supplies, Environmental Accessibility

7. Through statute and rules, the DD Waivers' waitlist categories prioritize those persons deemed to be in crisis. Rule 65G-1.047 of the Florida Administrative Code defines crisis as meeting one of three conditions:
 - a. "First priority" crisis category: The applicant is currently homeless, living in a homeless shelter, or living with relatives in an unsafe environment.
 - b. "Second priority" crisis category: The applicant exhibits behaviors that, without provision of immediate waiver services, may create a life-threatening situation for the applicant or others, or that may result in bodily harm to the applicant or others requiring emergency medical care from a physician
 - c. "Third priority" crisis category: The applicant's current caregiver is in extreme duress and is no longer able to provide for the applicant's health and safety because of illness, injury, or advanced age. The applicant needs immediate waiver services to remain living with the caregiver or to relocate to an alternative living arrangement.
8. Those persons on the waitlist that do not meet one of the three crisis priorities are further categorized into seven other categories pursuant to Section 393.065(5) of the Florida Statutes.
9. For at least the past five years, only those persons deemed to be in crisis were enrolled on the DD Waiver.

Adaptations, In-Home Support Services, Medication Review, Occupational Therapy, Personal Care Assistance, Personal Emergency Response Systems, Physical Therapy, Private Duty Nursing, Residential Habilitation Services, Residential Nursing Services, Respiratory Therapy, Respite Care, Skilled Nursing, Special Medical Home Care, Specialized Mental Health Services, Speech Therapy, Support Coordination, Supported Employment, Supported Living Coaching, and Transportation.

10. For at least the past five years, the defendants have limited the number of crisis enrollments to only those that could be served with funding saved through attrition (*i.e.*, when a current enrollee dies, becomes ineligible or moves out of state).

11. The defendants' statutes, rules and policies for management of the waitlist forces persons with developmental disabilities currently residing in the community to forgo services completely while waiting for one of the three desperate and dangerous categories of crisis to take hold.

12. For those persons already institutionalized, they will never be enrolled in the DD Waivers so long as the State continues to only fund enrollments of those in crisis.

13. The plaintiffs seek to remedy the pervasive systemic and continuing failure of the defendants to provide necessary services in a reasonably prompt manner to meet their needs, as required by the integration mandate of Title II of the Americans with Disabilities Act ("ADA"). *See* 28 C.F.R. § 35.130(d).

14. The plaintiffs seek a declaration that denial of adequate services with reasonable promptness and the denial of freedom of choice of those waitlisted persons violates Title XIX of the Social Security Act, 42 U.S.C. § 1396a *et seq.*, 42 C.F.R. § 431 *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and 42 U.S.C. § 1983.

JURISDICTION

15. This Court has jurisdiction over the claims presented in this action pursuant to 28 U.S.C. § 1331. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

16. The plaintiffs' claims are predicated upon the applicable provisions of the Medicaid Act, namely 42 U.S.C. §§ 1396a(a)(8) & (23) & 42 C.F.R. § 435.930, requiring

the delivery of Medicaid services to eligible persons with reasonable promptness and freedom of choice of providers; the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Plaintiffs' claims for relief are also predicated upon 42 U.S.C. § 1983, which authorizes actions to redress the deprivation, under color of state law, of rights privileges and immunities secured by the Constitution and laws of the United States.

NAMED PLAINTIFFS

JOANNA DYKES

17. Joanna Dykes, (“DYKES”), is a 23 year old woman diagnosed with an intellectual disability³ and mental illness. She has no family and resides in an ICF/DD at Florida Mentor Facility, in Pensacola, Florida.

18. DYKES desires to live independently. She is articulate and repeatedly requests to move to a supported living environment. She is capable of being employed and has received the services of a Supported Employment Coach through Vocational Rehabilitation Services. DYKES has had job interviews and hopes to be gainfully employed so that she can be more independent. She was forced to turn down an offer of

³ The developmental disabilities community strongly encourages use of the term “intellectual disability” in lieu of “mental retardation” or “retardation.” *See* Shalock, Luckasson, and Shogren. “The Renaming of ‘Mental Retardation:’ Understanding the Change to the Term ‘Intellectual Disability.’” *Intellectual and Developmental Disabilities*. Vol. 45, No. 2: 116-124 (2007). *See also* Pub. Law. 111-256, § 1, Oct. 5, 2010, 124 Stat. 2643 (“Rosa’s Law”). “Retardation” is defined in Section 393.063 of the Florida Statutes. For purposes of consistency, since the State of Florida and APD still use the term “retardation” or “mental retardation,” those terms will be used interchangeably.

employment because a prior ICF/DD she was living at would not provide transportation in the later hours of the evening when she would have been ending her shift.

19. DYKES no longer had support from natural sources when she reached the age of majority. She eventually became a resident of the Lakeview Center due to proceedings under the Baker Act. During discharge from Lakeview, DYKES was not apprised of the DD Waiver or its waitlist. She was placed in a privately owned ICF/DD and no longer received the services of a support coordinator and instead relied on her client advocate to seek services in her best interests.

20. After several years residing in the ICF/DD, DYKES's client advocate learned of the DD Waiver. DYKES has been placed on the waitlist for DD Waiver for over three years. DYKES is capable of living in a supported living situation with the assistance of community services such as in-home supports and supported living coaching.

21. Despite her desire and ability to live in a community setting, DYKES has remained at the ICF/DD with little to no hope of ever residing in the community. DYKES has been informed that enrollments to the DD Waivers have been limited to crisis enrollments. Because of DYKES' placement in an ICF/DD, she would never meet the definition of crisis as defined in Rule 65G-1.047 of the Florida Administrative Code.

22. Section 393.065 of the Florida Statutes and Rules 65G-11.001-.003 of the Florida Administrative Code require placement of DYKES into Category 3 of the waitlist prioritization categories.

23. DYKES has not received notification of her assignment to Category 3 and any appealable rights she may or may not have for that assignment.

24. Because of DYKES's living situation in the ICF/DD, she will never meet the requirements for any of the preceding categories other than Category 3 and will, therefore, never move up in priority for enrollment on the waiver. Should the State continue to limit funding for only those deemed to be in crisis, DYKES will never be considered for enrollment on the DD Waiver and will remain segregated in contravention to the integrated setting she desires and for which she qualifies.

DAVID WALKER

25. David Walker ("WALKER") is an individual diagnosed with mental retardation and cerebral palsy. He resides with other persons with developmental disabilities in a cluster ICF/DD in Holly Hill, Florida.

26. WALKER files this complaint through his guardian advocate, Michele Beauregard of Deltona, Florida.

27. WALKER requires assistance in daily living. He requires verbal prompts or assistance in eating, uses a wheelchair, requires assistance in shifting his weight or transferring, assistance in maintaining his personal hygiene and remaining safe. He would benefit from services such as personal care assistance, adult day training program, and/or companion.

28. WALKER was previously a resident of Sunland, a state-run institution, and was then enrolled in the DD Waiver and lived in a group home. Due to illness, WALKER was admitted to a hospital and then a nursing home. While recovering at the nursing home, WALKER lost his placement at the group home. His public guardian at the time then placed WALKER in an ICF/DD foregoing his DD Waiver services.

29. In 2003 his current Guardian applied for the DD Waiver for WALKER. He was placed on the waitlist for the DD Waiver and has remained there for seven years.

WALKER is able to reside in the community and desires to do so but is in need of assistance through the DD Waiver.

30. WALKER has been informed that enrollments to the DD Waiver have been limited to crisis enrollments. Because of his placement in an ICF/DD, he would never meet the definition of crisis.

31. Section 393.065 of the Florida Statutes and Rules 65G-11.001-.003 of the Florida Administrative Code require placement of WALKER into Category 3 of the waitlist prioritizations categories.

32. WALKER has not received notification of his assignment to Category 3 nor any rights he may have to appeal that action.

33. Because of WALKER's living situation in the ICF/DD, he will never meet the requirements for any of the preceding categories other than Category 3 and will, therefore, never move up in the enrollment of individuals to the waiver. Without funding for categories other than crisis, David will remain institutionalized as he will never be considered in crisis pursuant to APD's rules.

HEATHER YOUNG

34. Heather Young ("YOUNG") is a 21 year old individual diagnosed with mental retardation and orthopedic impairments including paralysis.

35. YOUNG was placed into Florida's foster care system at the age of 11 years and should have transitioned to the DD Waiver once she aged out of the foster care system.

However, that did not happen and she has instead been placed on the DD Waivers waitlist for over four years.

36. YOUNG has waited for community placements while being served in institution-like settings. She currently resides in a nursing home where she has been unable to fully access the community and live in the community with supports.

37. Despite her paralysis and orthopedic impairments, YOUNG is able to utilize one hand and communicates effectively with an alphabet board. She requires some medical assistance with a gastric tube and tracheotomy, but has valiantly overcome Methicillin-resistant Staphylococcus aureus (MRSA) and a year-long battle with needing a respirator. She is now respirator-free and able to live in the community with supports.

38. YOUNG has been informed that enrollments to the DD Waivers have been limited to crisis enrollments. Because of her placement in a skilled nursing facility, she would never meet the definition of crisis.

39. Section 393.065 of the Florida Statutes and Rules 65G-11.001-.003 of the Florida Administrative Code require placement of YOUNG into Category 3 of the waitlist prioritizations categories.

40. YOUNG has not received notification of her assignment to Category 3 nor any rights she may have to appeal that assignment.

41. Because of YOUNG's age and living situation in the nursing facility, she will never meet the requirements for any of the preceding categories other than Category 3 and will, therefore, never move up in the priority for enrollment to the waiver. Unless the State ceases to allow only crisis enrollments, she will remain segregated in the nursing

facility, never realizing the benefit of community services and the integration mandate of the ADA.

MICHELLE CONGDEN

42. Michelle Congden (“CONGDEN”) is a 34 year old individual diagnosed with mental retardation. She currently resides with her sister and her sister’s three young children.

43. CONGDEN applied for and was placed on the DD Waivers waitlist thirteen years ago. While waiting, CONGDEN’s father passed away and she moved in with her sister. She has lived with her sister for almost eight years now.

44. CONGDEN’s sister is the sole caregiver for her own three children as well. CONGDEN’s sister is in need of respite in order to avoid institutionalizing her. CONGDEN would benefit from a day program or companion.

45. APD is able to utilize general revenue funds for the provision of individual and family services to those on the waitlist who have emergency needs that are critical to avoiding a crisis situation. However, this method of utilizing general revenue funds is precarious. CONGDEN’s sister was notified that she could utilize some nominal monies for CONGDEN, but would have to do so by the end of the month, leaving little time to coordinate any care or benefits for CONGDEN.

46. Section 393.065 of the Florida Statutes and Rules 65G-11.001-.003 of the Florida Administrative Code require placement of CONGDEN into Category 6 of the waitlist prioritizations categories.

47. CONGDEN has not received notification of her assignment to Category 6 nor any rights she may have to appeal that decision.

48. Because of CONGDEN's age, the age of her caregiver, and her living situation, it would be decades longer before she met the requirements for any of the preceding categories other than Category 6 and will, therefore, never move up in the priority for enrollment to the waiver. CONGDEN is essentially relegated to the very end of a waitlist without a chance of progression, giving rise to a sort of subclass of persons who are likely never to see funding for their category to enroll, until crisis occurs.

AMANDA PIVINSKI

49. Amanda Pivinski ("PIVINSKI") is a young woman of 24 years and residing with her parents. She has been on the DD Waiver waitlist for over 7 years.

50. Because PIVINSKI's parents are healthy and under 70 years of age, she is unlikely to ever move to any of the higher categories.

51. PIVINSKI has been diagnosed as having Autism Spectrum Disorder. She has been determined to be disabled, receives SSI, and eligible for an institutional level of care.

52. Yet, PIVINSKI is able to reside in the community, maintains a job, and continues to be in need of services. Her employment, however, was recently jeopardized by the need for a job coach. While she is capable of residing in her own apartment if she had the necessary supports, she is confined to her parents' home because without those supports, a residence of her own in the community could jeopardize her health and welfare.

53. The defendant's categorization of those persons on the waitlist places PIVINSKI's parents in the precarious position of having to evict their own daughter in order to secure services for her before they die or become incapable.

54. Section 393.065 of the Florida Statutes and Rules 65G-11.001-.003 of the Florida Administrative Code require placement of PIVINSKI into Category 6 of the waitlist prioritizations categories. Because of her parents' age and living situation in her family home, she will never meet the requirements for any of the preceding categories other than Category 6 for several decades.

55. Unless the defendants cease to admit only crisis enrollments, PIVINSKI will remain without services never realizing the benefit of the integration mandate of the ADA, or forced to seek institutionalization to receive services.

56. PIVINSKI will also be subject to the continued displacement from enrollment by the wave of enrollments from Category 5 which includes those expected to graduate from secondary school within the next 12 months. Without funding to completely and continuously fund Category 5, the State will never enroll those persons like PIVINSKI who are relegated to Categories 6 and 7 and they will remain a sub-class of un-served persons.

DISABILITY RIGHTS FLORIDA

57. Disability Rights Florida, formerly known as the "Advocacy Center for Persons with Disabilities, Inc.," (the "P&A"), is a not-for-profit-corporation serving as Florida's federally funded protection and advocacy system for individuals with disabilities. The

P&A maintains offices in Tampa, Hollywood and Tallahassee. Its main office is located at 2728 Centerview Drive, Suite 102, Tallahassee, Leon County, Florida.

58. The P&A's mission is to advance the quality of life, dignity, equality, self-determination, and freedom of choice of people with disabilities through collaboration, education, and advocacy, as well as legal and legislative strategies.

59. Under its federal authority, the P&A is authorized to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for the rights of all individuals with disabilities within the State of Florida.

60. Specifically, on behalf of persons with developmental disabilities, the P&A is authorized by federal law to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of individuals within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements." 42 U.S.C. § 15043(a)(2)(A)(i).

61. The P&A has represented and continues to represent persons with developmental disabilities in individual actions, class actions and systemic relief initiatives affecting all such individuals.

62. The defendants' policy adversely affects the substantial interests of the P&A, as clients and potential clients who are on the DD Waivers' waitlist are not receiving needed services due to their placement on the wait list.

63. The P&A has standing to file this action as it provides representation and other legal services to persons receiving Medicaid services under the DD Waiver. *See Florida*

Institutional Legal Servs., Inc. v. Florida Parole & Probation Comm'n, 391 So. 2d 247 (Fla. 1st DCA 1980). Additionally, challenging the defendants' policy falls within the P&A's general scope of interest and activity, and the relief requested, declaratory and injunctive, is the type of relief appropriate for the plaintiffs to receive on behalf of the individuals who the P&A is mandated to serve. *See NAACP, Inc. v. Florida Bd. of Regents*, 863 So. 2d 294 (Fla. 2003), *on remand*, 876 So. 2d 636 (Fla. 1st DCA 2004).

64. The P&A and the individual plaintiffs are represented in this action by undersigned counsel. Service should be made at the address of counsel as set forth below.

DEFENDANTS

ELIZABETH DUDEK

65. The defendant, Elizabeth Dudek (DUDEK), is the Secretary of Florida's Agency for Health Care Administration (AHCA) and is being sued in her official capacity. AHCA is the chief health policy and planning entity for the state, and is responsible for administering Florida's Medicaid Program, including the Waiver Programs. *See* §§ 20.42(3) & 393.0661, Fla. Stat.

BRIAN VAUGHAN

66. The defendant, Brian Vaughan (VAUGHAN), is the Interim Director of Florida's Agency for Persons with Disabilities (APD) and is being sued in his official capacity. APD is responsible for providing all services to persons with developmental disabilities

under Chapter 393 of the Florida Statutes, including state-run ICF/DDs as well as the programmatic management of Medicaid waivers established to provide services to persons with developmental disabilities. *See* § 20.197(3), Fla. Stat. APD administrates the Medicaid DD Waiver program under an interagency agreement with AHCA.

RICK SCOTT

67. Governor Rick Scott (SCOTT) is the chief executive officer of the State of Florida. He is responsible for directing, supervising and controlling the executive departments of state government. Governor SCOTT is ultimately responsible for ensuring that Florida operates its long-term care system for people with disabilities in conformance with federal law. He is sued in his official capacity and only for prospective injunctive relief.

68. At all times relevant to this Complaint, the defendants were and are acting under color of state law and knew or should have known of the policies, practices, acts and conditions alleged herein.

CLASS ACTION ALLEGATIONS

69. Pursuant to Fed. R. Civ. P. 23 (a) and (b)(2), the named plaintiffs bring this action on behalf of themselves and all other persons similarly situated.

70. The proposed class consists of:

- a. all eligible individuals who are enrolled on the DD Waiver waitlist and residing in institutions or institution-like settings, including but not limited to skilled nursing facilities;

- b. all eligible individuals residing in institutions or institution-like settings who possess both the desire and capability to reside in the community with supports;
- c. eligible individuals enrolled on the DD Waiver waitlist who would be or are assigned to categories three through seven; and
- d. eligible individuals who will be subject to defendant's implementation of Florida's statute and rule to place them in waitlisted categories three through seven if they apply for the DD waiver in the future.

71. Numerosity: The class is so numerous that joinder of all its members is impracticable. The plaintiffs believe that there are over 19,000 class members, because it is believed that there are 19,000 individuals on the DD Waiver waitlist. Although the exact number is known to the defendants and is ascertainable, plaintiffs do not know the exact number of the individuals.

72. Commonality: There are questions of law or fact that are common to all named plaintiffs, as well as to all putative class members including:

- a. Whether the defendants' policies unnecessarily cause and perpetuate the segregation and discrimination through continued institutionalization of persons with developmental disabilities, violating the ADA's integration mandate as enforced through 42 U.S.C. § 1983.
- b. Whether the defendants' relegation of persons with developmental disabilities to a waitlist that has not been effectively funded for over five years violates Medicaid Act's requirement for the provision of services with reasonable

promptness pursuant to 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.930 through 42 U.S.C. § 1983.

c. Whether the defendants' failure to enroll into the DD Waiver persons currently institutionalized and those turned away for crisis enrollment denies those plaintiffs the Medicaid Act's requirement for the freedom of choice of provider of services pursuant to 42 U.S.C. § 1396n(c)(2), enforced through 42 U.S.C. § 1983.

73. Typicality: The claims of the named plaintiffs are typical of the claims of the class as a whole in that the named plaintiffs and purported class are Medicaid eligible recipients who have been denied home and community based services by being placed on a lengthy waitlist that has little to no hope of culminating in community based services.

74. Adequate representation: The named plaintiffs will fairly represent and adequately protect the interests of members of the class as a whole. The named plaintiffs do not have any interests antagonistic to those of other class members. By filing this action, the named plaintiffs have displayed an interest in vindicating their rights, as well as the claims of others who are similarly situated. The relief sought by the named plaintiffs is represented by counsel who are skilled and knowledgeable about civil rights litigation, Medicaid law, practice and procedure in the federal courts, and the prosecution and management of class action litigation.

75. The defendants have acted or refused to act on grounds generally applicable to the class, making final injunctive relief appropriate with respect to the class as a whole under Fed. R. Civ. P. 23(b)(2). Although the specific disabilities of the class members vary,

they share a common need for services provided by the DD Waiver Program, have been found to need and are eligible for these services as they meet the level of care required for placement in an ICF/DD, and have been denied an opportunity to receive prompt services on the DD Waivers. A class action is superior to individual lawsuits for resolving this controversy.

MEDICAID STATUTORY AND REGULATORY FRAMEWORK

Medicaid Optional and Mandatory Services

76. Medicaid is a joint federal/state program authorized by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v. It provides medical assistance to low income individuals who meet certain eligibility requirements.

77. States are not required to participate in the Medicaid Program. If a state elects to participate, however, it is required to comply with applicable federal statutory and regulatory requirements.

78. The Medicaid program allows states to furnish persons (including those with developmental disabilities) "rehabilitation and other services to help such families and individuals attain or retain capability for independence or self care." 42 U.S.C. § 1396.

79. In addition to providing services that support the independence of those who participate in the program, the Medicaid Act requires that each state medical assistance program be administered in the best interests of the recipients. *See* 42 U.S.C. §1396a(a)(19).

80. Federal funding is available to state Medicaid programs for both the provision of

health care services and various administrative functions. The amount of federal funding available to a state is referred to as federal financial participation (FFP) and is determined by comparing a state's per capita income to the national average.

81. The Medicaid state plan must identify the required and optional health care services that are available through the state Medicaid program.

82. In addition to the required services that each Medicaid program must provide, a state may choose from among thirty-four optional services to include in its state plan. Once an optional service is identified in the state plan, this service must be provided consistent with all federal requirements.

83. Placement in an ICF/DD is an optional Medicaid service. Florida has opted to provide ICF/DD Medicaid services to persons who meet level of care criteria for placement in an ICF/DD. *See* § 409.906(15), Fla. Stat. Thus, placement and receipt of services in an ICF/DD are an entitlement.

84. In an ICF/DD, a client receives a continuous active treatment program, including “aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services ..., that is directed toward the acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and the prevention or deceleration of regression or loss of current optimal functional status.”

85. The Medicaid Act also requires that a state plan for medical assistance "must . . . provide that all individuals wishing to make application for medical assistance under the

plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8).

86. Federal regulations require that a state Medicaid agency must "furnish Medicaid promptly to recipients without delay caused by the agency's administrative procedures" and "continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." 42 C.F.R. § 435.930.

87. Medicaid beneficiaries are allowed to choose their health care professionals from a range of participating providers. *See* 42 U.S.C. § 1396a(a)(23).

Medicaid Waivers and Developmental Disabilities Service Delivery System

88. Medicaid home and community-based services waiver programs are authorized by 42 U.S.C. § 1396n(c) and governed by 42 C.F.R. §§ 441.300-.310. Waiver programs enable states to provide home and community-based services to individuals with developmental disabilities or mental retardation who would otherwise need the level of care provided in an ICF/DD.

89. Chapter 409 of the Florida Statutes and the Rule 59G-13.080 of the Florida Administrative Code authorize the Florida Medicaid Developmental Disabilities Waiver (DD Waiver program). The Florida DD Waiver program is a home and community-based waiver whose purpose is to maintain persons with developmental disabilities in a home setting with supporting services necessary to prevent institutionalization.

90. The DD Waiver program allows states to waive three specific Medicaid requirements: state-wideness, comparability of services, and community income and resource rules.

91. A state's DD Waiver program must comply with all federal Medicaid requirements that are not specifically waived, including reasonable promptness.
92. States apply to the Centers for Medicare & Medicaid Services (CMS) for permission to operate a home and community based waiver. The waiver must be approved before it can be effective.
93. When a state offers waiver services, it must inform individuals likely to require nursing home or ICF/DD care about "any feasible alternatives available under the waiver" and give them the "choice of either institutional or home and community-based services." 42 U.S.C. § 1396n(c)(3). *See also* 42 C.F.R § 441.302(d).

Florida Medicaid

94. Florida defines ICF/DD as a facility licensed under state law and certified under federal regulations to furnish health care, rehabilitative services, and other related services to individuals who have mental retardation, a developmental disability or related conditions. *See* FLA. ADMIN. CODE r.65G-1.010(131).
95. Pursuant to Chapters 409 and 393 of the Florida Statutes, Florida provides Medicaid services to persons with developmental disabilities. Florida defines "Developmental disability" as "a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely." § 393.063(9), Fla. Stat.

96. Under Federal and Florida Medicaid program statutes and rules, persons who meet level of care criteria for placement in an ICF/DD are also eligible to receive services in the community under the DD Waiver program.

97. The purpose of the DD Waiver is to maintain these persons in the community and prevent institutionalization.

98. ICF/DD's are considered institutional placements and annually cost more than services in the community.

Florida's DD Waiver and ICF/DD Program

99. Florida has declared "the greatest priority shall be given to the development and implementation of community-based services that will enable individuals with developmental disabilities to achieve their greatest potential for independent and productive living, enable them to live in their own homes or in residences located in their own communities, and permit them to be diverted or removed from unnecessary institutional placements." § 393.062, Fla. Stat.

100. Florida operates a four-tiered DD Waiver program. Each tier is a separate waiver and, per statute, has its own annual expenditure limit per individual. Tier 4 has the lowest annual expenditure limit and Tier One has the highest.

101. Florida has limited the funding of DD Waiver slots to approximately 30,000 individuals for all four DD waivers in total.

102. As of October 2008, over 14,000 individuals were enrolled in Tier 4, which, per statute, has an annual spending cap of \$14,422.00.

103. Tier 4 has the largest number of individuals enrolled of the four tiers.
104. Over 40% of the clients served in the community by the defendants are served with the lowest annual spending limit available.
105. For Fiscal Year 2009-2010, Florida appropriated \$268,774,378.00 for services to persons in the community.
106. APD's state-run developmental disabilities centers cost \$65,856,629.00 in FY 2009-2010.
107. As of August 26, 2009, there were 2,078 Medicaid recipients in privately owned and operated IDF/DDs at a cost of \$9,349.00 per person per month.
108. For state fiscal year 2008-2009, the average cost of a person in an ICF/DD was \$114,148.00 per person annually.
109. For state fiscal year 2008-2009, the average cost of a person in the DD waiver was \$32,613.00.

The DD Waiver Wait List

110. Currently there are over 19,000 individuals, both children and adults, on the wait list for the DD Waiver program.
111. Defendants steer individuals to accept unavailable waiver services while not developing additional providers or increasing funding. Florida's policies evidence an imbalance of the delivery of services that belie its stated intent.
112. APD has adopted rules to implement the waitlist categories pursuant to Florida Statute §393.065(5). *See* FLA. ADMIN. CODE r. 65G-11.002. They are:

- a. Category 1 includes individuals determined to meet the crisis criteria specified in Rule 65G-1.047 of the Florida Administrative Code;
- b. Category 2 includes children who are jointly served by the Agency and the Department of Children and Family Services (“DCF”, also known as the Department of Children and Families) in the Child Welfare program;
- c. Category 3 includes the following individuals:
 - i. Individuals for whom the caregiver has a condition or circumstance that is expected to render the caregiver unable to provide care within the next twelve months and other caregivers are unable, unwilling or unavailable to provide care.
 - ii. Individuals who are at substantial risk of incarceration or court commitment which is defined as unlawful activity by the individual that has required the intervention of local or state law enforcement even if the unlawful activity did not result in an arrest or criminal charges.
 - iii. Individuals who are currently incarcerated and are expected to be released within 12 months.
 - iv. Individuals whose behaviors or physical needs place them or their caregiver at risk or harm within the next 12 months, and for whom no other supports are currently available to meet their needs.
 - v. Individuals who are identified by the facility as ready for discharge from a state mental health hospital, intermediate care facility for

the developmentally disabled, a skilled nursing facility, correctional facility, or a secure forensic facility within the next 12 months.

- vi. Individuals receiving Voluntary Protective Services (VPS) or requesting DCF assistance to prevent their child from entering foster care.
- d. Category 4 includes individuals whose primary caregiver is age 70 years of age or older and no other alternate caregiver is available, willing or able to provide support.
- e. Category 5 includes individuals who are expected to graduate from secondary school within the next 12 months, individuals who have received a special diploma and need the support available through waiver funded services to obtain or maintain competitive employment, or individuals who have applied for and been accepted to an accredited institution for postsecondary education.
- f. Category 6 includes individuals who are 21 years of age or older, and do not meet the criteria for any other category.
- g. Category 7 includes those individuals who are younger than 21 years of age and who do not meet the criteria for any other category.

113. As of July 1, 2010, APD reported that 37.2% of those on the waitlist had been waiting for community services longer than five years and 12.2% had been waiting for four to five years.

114. Despite the legislative intent of Chapter 393 of the Florida Statutes, there has been no expansion of DD Waiver funding and no waiver enrollments available to non-crisis Medicaid eligible recipients.

115. For at least the past five years, new enrollees to the DD Waiver have been funded only through attrition, meaning persons currently enrolled in the DD Waiver must become ineligible, move out of state or die before funds are available for those persons applying for services.

116. The defendants provide minimal services to individuals on the waitlist through general revenue funds in order to stave off enrollment on the DD Waivers or institutionalization.

117. The use of general revenue funds does not draw down federal matching funds and deprives the individual of the full array of DD Waiver services.

Unnecessary Institutionalization of Florida Citizens

118. At present, there are approximately 198 persons with developmental disabilities registered for the DD waiver program's waitlist residing in private ICF/DDs.

119. In further contravention of its stated intent, Florida's numbers in nursing home admissions for persons with developmental disabilities has risen steadily in recent years.

120. At present, there are approximately 115 persons with developmental disabilities registered for the DD waivers waitlist residing in nursing homes.

121. Persons on the waitlist languish for years without DD Waiver services that meet their needs in the most integrated setting possible.

122. APD's waitlist of approximately 19,000 people evidences the community's desire for DD Waiver services over other institutional-like settings.

123. Despite Florida's intention to concentrate its efforts on community services and the growing demand for these services, Florida continues to serve individuals in costlier institutional settings, including ICF/DDs and nursing homes, whether state or privately operated.

COUNT ONE

REASONABLE PROMPTNESS

124. Paragraphs 1 through 123 are incorporated by reference.

125. This count is brought pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396a, 42 C.F.R. § 435.930, and 42 U.S.C. § 1983.

126. The defendants voluntarily participate in the federal Medicaid program under 42 U.S.C. § 1396 *et seq.*

127. Federal law requires that any state which elects to participate in the Medicaid program to provide all services, including DD Waiver services, to eligible individuals with reasonable promptness.

128. The defendants have failed and continue to fail to provide adequate DD Waiver services with reasonable promptness by developing and implementing policies designed to place Medicaid eligible individuals with developmental disabilities on a wait list for waiver services with no real chance of ever enrolling in the DD Waiver and realizing the benefits of community integration.

129. The defendants' operation of the DD Waiver has resulted in five years of stagnant growth where an enrolled person would either have to die or move out of state in order for a DD Waiver slot to be available to a new enrollee.

130. The unavailability of services in the community relegates Medicaid eligible persons with developmental disabilities to a wait list placement for years in violation of the reasonable promptness provisions of Title XIX of the Social Security Act, 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.930.

131. The defendants continue to administer the State's Medicaid system in a manner that limits the availability of community services by over-utilizing large institutional and institution-like facilities depriving the use of resources for development of community services desired by and appropriate for the putative class members.

132. The consequence of the defendants' actions is the costlier placement of persons with disabilities in inappropriate settings such as large ICF/DDs and nursing facilities.

133. At least 498 persons with developmental disabilities currently are registered for the DD Waiver waitlist and reside in either a private ICF/DD or nursing facility.

134. The plaintiffs have suffered harm and will continue to suffer harm, for which there is no adequate remedy at law, as a direct and proximate result of defendants' violations of the Medicaid Act and implementing regulations.

135. Named plaintiffs DYKES, WALKER, and YOUNG, as well as those similarly situated, will never qualify for crisis because of their placements in institutions and are dependent upon the State to develop and implement a working plan that actually funds all categories of Florida's waitlist prioritizations in order to receive services in the most

integrated setting possible.

136. Named plaintiffs CONGDEN and PIVINSKI and those similarly situated, have been placed on a wait list for services that are likely to take decades to materialize, or would only materialize when the client is actually threatened with homelessness or institutionalization.

COUNT TWO

FREEDOM OF CHOICE

137. Paragraphs 1 through 123 and 126 through 136 are incorporated by reference.

138. This count is brought pursuant to 42 U.S.C. § 1983.

139. The defendants engage in a pattern and practice that forces plaintiffs to forgo any Medicaid services and to languish on the wait list until their caregivers are incapacitated or die for enrollment in the DD Waiver to occur.

140. The defendants' pattern and practice violates statutory freedom of choice requirement under the Social Security Act, § 1915(c)(2), as amended, 42 U.S.C. § 1396n(c)(2), as defendants require Medicaid eligible individuals to choose between (1) an indefinite and lengthy placement on the DD waiver waitlist without services, or (2) placement in an ICF/DD with services but decreased independence, where they would be frozen in category 3.

141. The defendant's pattern and practice to forgo continued counseling of the right to elect to receive services in the community after placement in an institution or institution-like facility violates statutory freedom of choice requirement under the Social Security

Act, § 1915(c)(2), as amended, 42 U.S.C § 1396n(c)(2).

142. Named plaintiffs DYKES and WALKER were placed in ICF/DDs despite their desire and ability to reside in the community. DYKES and WALKER were unable to secure enrollment in, or even placement on the waitlist for, the DD Waiver due to the unavailability of family or advocates at the time of their placement in the ICF/DDs.

143. The defendants have failed to continue with the choice counseling necessary of ICF/DDs residents to ensure a more integrated setting is not appropriate for those individuals.

144. The defendants do not routinely and continuously identify those persons with developmental disabilities residing in ICF/DDs that are capable of and desire to reside in the community.

145. The defendants do not have a proactive plan to utilize their professional judgment in identifying the most integrated setting possible for persons residing in ICF/DDs.

146. Named plaintiff YOUNG was placed in a nursing home despite having the ability to reside in the community for less cost with appropriate services.

147. The defendants have failed to identify all of those persons eligible to receive services through the DD Waiver that have been diverted to nursing homes and to routinely and continuously offer choice counseling to ensure a more integrated setting is not appropriate for those individuals.

148. Due to their placement on the wait list, named plaintiffs CONGDEN and PIVINSKI, are denied the freedom of choice of providers by ensuring that the only provider reasonably available to them is an institution.

COUNT THREE

AMERICAN WITH DISABILITIES ACT

149. Paragraphs 1 through 123, 126 through 136, and 139 through 148 are incorporated by reference.

150. This count is brought pursuant to 42 U.S.C. § 1983.

151. The defendants are public agency directors responsible for operation of a public entity, pursuant to 42 U.S.C. §§ 12131(1)(A)&(B).

152. The defendants' pattern and practice in its administration of the Medicaid waiver program violates the ADA, 42 U.S.C. § 12101 *et seq.*, in that Florida continues to fund unnecessary placements of individuals with similar disabilities in ICF/DDs at the expense of those individuals seeking services in the community, to the detriment of both groups.

153. Pursuant to the ADA, public entities, including the defendants in this cause, must administer services, programs and activities in "the most integrated setting appropriate" to the needs of qualified individuals with disabilities. *See* 28 C.F.R. § 35.130(d).

154. The ADA's implementing regulations further provide that "a public entity may not, directly or through contractual or other arrangements, utilize criteria or other methods of administration: (i) that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the entity's program with respect to individuals with disabilities..." 28 C.F.R. § 35.130(b)(3).

155. The defendants have engaged in a pattern and practice of funding unnecessary and costlier institutional placements of eligible individuals to the detriment of the named

plaintiffs and class members awaiting services through the community.

156. The defendants' pattern and practice of unnecessarily allocating these funds for institutional long-term care contravenes the state's intent as in Section 393.062 of the Florida Statutes and is in violation of the ADA.

157. The defendants have engaged in a pattern and practice of unnecessarily institutionalizing plaintiffs and class members by failing to properly assess the services and supports needed to reside in the community and failing to inform those plaintiffs and class members of the availability of community services upon admission and thereafter to the ICF/DDs, nursing homes, and other institution-like settings.

158. The defendants' diversion of resources and categorization of waitlisted persons consequently results in a pattern of enrolling only those clients in crisis to the DD Waiver, perpetuating the unnecessary segregation of those in institutions and virtually locking the doors of the institutional facilities so that no resident will ever receive community services.

159. The defendants' use and administration of state Medicaid resources violates the anti-discrimination provision of the ADA, 42 U.S.C. § 12132, by constructively offering only institutional care instead of community-based care to eligible individuals.

160. The result of the defendants' patterns and practices is that eligible individuals are forced to choose between forgoing services in order to remain in the community or forgoing independence to obtain services in institutions or institution-like placements.

161. The defendants' patterns and practices subject the plaintiffs to harm and injury by segregating named plaintiffs and class members and indefinitely depriving them of social

integration by failing to continuously assess the appropriateness of their placement in ICF/DDs or nursing homes as opposed to receiving services in a community setting.

162. The defendants' patterns and practices subject the named plaintiffs, DYKES, YOUNG and WALKER, and class members, to permanent placement on the DD Waiver waitlist due to the prioritization of individuals awaiting services pursuant to Section 393.065(5) of the Florida Statutes and Rules 65G-11.001-.003 of the Florida Administrative Code.

163. The defendant's patterns and practices subject the named plaintiffs, DYKES, YOUNG and WALKER, and class members, to permanent placement on the DD Waiver waitlist due to the accompanying policies to continue funding their own unnecessary institutional placements in lieu of community services.

164. The defendants' patterns and practices subject the named plaintiffs CONGDEN and PIVINSKI and class members residing in the community awaiting services to a constructive permanent placement on the waitlist due to the continued allocation of scarce resources to unnecessary institutional placements in lieu of community resources.

COUNT FOUR

SECTION 504 OF THE REHABILITATION ACT and THE ADA

165. Paragraphs 1 through 123, 126 through 136, 139 through 148, and 151 through 164 are incorporated by reference.

166. This count is brought pursuant to 42 U.S.C. § 1983.

167. The defendants direct state agencies that receive federal financial assistance.

168. The ADA, 42 U.S.C. § 12101 *et seq.*, mandates that public entities, such as the defendants' agencies, provide services to persons with disabilities in the most integrated setting appropriate to meet the needs of eligible individuals. Section 504 of the Rehabilitation Act of 1973 also contains an integration mandate for recipients of federal funds. *See* 29 U.S.C. § 794.

169. Section 504's regulations prohibit recipients of federal financial assistance from:

Utiliz[ing] criteria or methods of administration... (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons.

45 C.F.R. § 84.4(b)(4); 28 C.F.R. § 41.51(b)(3)(1).

170. 28 C.F.R. § 41.51(d) requires a public entity to administer its services, programs and activities "in the most integrated setting appropriate" to the needs of qualified individuals with disabilities.

171. The defendants have engaged in a pattern and practice of funding unnecessary and costlier institutional placements of certain plaintiffs and class members at the detriment of those named plaintiffs and class members awaiting services through the community. The defendants' pattern and practice of unnecessarily allocating these funds for institutional long-term care contravenes the state's intent as in Section 393.062 of the Florida Statutes and in violation of Section 504 of the Rehabilitation Act and the integration mandate of the ADA.

172. The defendants have engaged in a pattern and practice of unnecessarily institutionalizing plaintiffs and class members by failing to properly assess the services

and supports needed to reside in the community and failing to inform those plaintiffs and class members of the availability of community services upon admission and thereafter to the ICF/DDs.

173. The defendants' failure to provide DD Waiver services to named plaintiffs and class members leaves them in jeopardy of receiving services in an institution or institutional-like facility rather than in a more integrated and appropriate setting in violation of the integration mandate of the ADA and 504 of the Rehabilitation Act.

174. The defendants' actions and inactions have failed to afford services in the most integrated setting appropriate to the needs of those eligible for services in violation of the integration mandate of the ADA and 504 of Rehabilitation Act, 42 U.S.C. § 12115 *et seq.*, 29 U.S.C. § 794, and the implementing regulations, and 28 C.F.R. §§ 35.130(d) and 41.51.

175. The defendants have engaged in conduct that allocates scarce resources for unnecessary institutionalization of named plaintiffs and class members at the expense of other class members seeking community services.

RELIEF REQUESTED

Plaintiffs request the following relief be granted:

- a. Certify this action as a class action pursuant to Fed. R. Civ. P. 23.
- b. Declare that the defendants' failure to provide named plaintiffs and class members with services in the most integrated setting appropriate to their needs violates Title II of the ADA, Section 504 of the Rehabilitation Act.

- c. Declare that the defendants' rules, policies and actions violate the Medicaid Act's freedom of choice and reasonable promptness provisions. Social Security Act, § 1915(c)(2), as amended, 42 U.S.C. §§ 1396a(a)(8) & 1396n(c)(2), and 42 C.F.R. § 435.930.
- d. As to the class members residing in family homes, enter a Permanent Injunction requiring the defendants to:
 - i. Inform named plaintiffs and class members that they may be eligible for publicly-funded community services and that they have the choice of such services; and
 - ii. Determine eligibility for those desiring community services and notify them in writing with due process rights for hearing in adverse determinations; and
 - iii. Conduct assessments and preliminary support plans that are centered on needs, and not available resources, through person-centered planning; and
 - iv. Ensure coverage of long-term care services and supports in the community by enrolling those eligible individuals most at risk of institutionalization as determined by their assessments and preliminary support plans; and
 - v. Determine the cost to enroll all class members residing in family homes and design and implement a comprehensive effective working plan to enroll those individuals in a reasonably prompt manner.
- e. As to the class members residing in institutions or institutional-like settings, enter a Permanent Injunction ordering the defendants to:

- i. Inform named plaintiffs and class members that they may be eligible for publicly-funded community services and that they have the choice of such services; and
 - ii. Determine eligibility for those desiring community services and notify them in writing with due process rights for hearing in adverse determinations; and
 - iii. Require waiver support coordinators to be assigned to develop discharge plans, support plans and individualized habilitation programs through person-centered planning for each plaintiff and class member;
 - iv. Transition each plaintiff and class member who desires to reside in the community with effective developmental services to the most integrated community setting appropriate with the necessary support services to meet the individual's needs;
 - v. Make available the necessary alternative residential facilities, home services and vocational and day services in the community to allow the individual to reside in the most integrated setting appropriate.
- f. Order the defendants to remove arbitrary administrative barriers which prevent class members from accessing individualized home and community based waiver services without alleging or facing a crisis situation precedent.
 - g. Order the defendants to provide plaintiffs and class members with necessary services to enable them to live in the community with reasonable promptness

- through the development of a comprehensive effective plan to eliminate and enroll persons from the DD Waiver waitlist.
- h. Order the defendants to determine the eligibility of and enroll class members relegated to categories of the waitlist that do not incorporate crisis and to continue enrolling those individuals at a reasonable rate and pace so that a comprehensive effective working plan to eliminate the waitlist exists.
 - i. Order the defendants to develop a reliable and accurate means of tracking and projecting service demand and associated trends in order to maintain a comprehensive effective working plan to enroll persons from the DD Waiver waitlist with reasonable promptness.
 - j. Award named plaintiffs and class members their reasonable attorneys' fees, litigation expenses and costs.
 - k. Grant such other relief as the court deems just and proper.

DATED in Tallahassee, Florida on this 23rd day of March 2011.

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